84-386

Office Supreme Court, U.S.
FILED
SEP 11 1984
ALEXANDER L. STEVAS.
CLERK

No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

* * * * * * * * * * * * * * * * * * * *

HARVEY D. HOLLOWAY,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * * * * *

BRIEF OF PETITIONER

* * * * * * * * * * * * * * * * * * * *

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933 Frank Nelson Building
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ATTORNEYS FOR PETITIONER

49 pp

No._____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

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HARVEY D. HOLLOWAY,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

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PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

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BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

!. Were the Petitioner's due process rights violated when the basis of his conviction was the uncorroborated testimony of an accomplice?

2. Were the Petitioner's due process rights violated when evidence of a separate and distinct offense was admitted at trial?

PARTIES

In the Circuit Court of Etowah County, Alabama; the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Harvey D. Holloway, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Etowah County, Alabama, and have been at issue throughout these proceedings.

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The decision of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction was issued on April 24, 1984, without opinion. Appendix "A".

The decision of the Alabama Supreme Court denying the Petitioner's writ of certiorari was rendered on July 13, 1984, without opinion. Appendix "B".

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on July 13, 1984 and this petition is filed within sixty days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioners writ include the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATUTORY PROVISIONS INVOLVED

The Alabama statute involved in the instant case is ¢ 12-21-222, Code of Alabama, 1975 regarding corroboration of an accomplice's testimony. A copy of this provision is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

I

The Petitioner was tried on a charge of trafficking in cannabis and was found guilty. A sentence of twenty years in the state penal system and a fine of $25,000.00 was imposed. An appeal followed to the Alabama Court of Criminal Appeals.

The basis of Petitioner's appeal was two-pronged. Initially, the Petitioner raised the issue that his Fifth Amendment due process rights were violated when his conviction was allowed to stand on the uncorroborated testimony of an accomplice. Secondly, the Petitioner alleged that his due process rights were violated when evidence was admitted pertaining to a separate and distinct controlled substance offense.

On April 24, 1984, the Court of Criminal Appeals of Alabama affirmed the conviction of the Circuit Court, without opinion. An application for rehearing and rule 39(k) motion was filed in the Court of Criminal Appeals raising the same issues and was denied without opinion on May 8, 1984.

Appendix "A"

Mr. Holloway then petitioned the Supreme Court of Alabama for a writ of certiorari alleging substantially the same issues. The petition was denied without opinion on July 13, 1984.

II

The petition is based on the following facts:

The Petitioner was observed by Sherriff's Deputies as a passenger in a car driven by Mr. Bolding. At one point the officers

observed Mr. Holloway approach a trailer and speak to two men. The men then followed Mr. Bolding's car and subsequently it stopped and several men took large bags from the trunk which was later determined to be marijuana. Throughout the exchange the Petitioner continued to occupy the passenger side of Mr. Bolding's car.

At trial Mr. Bolding gave the only testimony that linked Mr. Holloway with the marijuana. On rebuttal the State offered evidence to show that an old, inoperable car of the Petitioner's that was on Mr. Bolding's property in another county also contained marijuana.

SUMMARY OF THE ARGUMENT

The Petitioner contends that his Fifth and Fourteenth Amendment due process rights were violated when his conviction was grounded on the uncorroborated testimony of an accomplice. An Alabama statute specifically prohibits a conviction had on the testimony of an accomplice unless it is corroborated by other, independent evidence. Without the testimony of the accomplice in the present case the Petitioner could not have been found guilty of trafficking in cannibis under Alabama law.

Furthermore, on rebuttal the State introduced evidence that the Petitioner had an old car on land owned by the accomplice and after being told this by the accomplice the police found marijuana

in the trunk of the car. Both Alabama and Federal law prohibit the introduction of evidence concerning an unrelated separate criminal act.

This ruling is based on the promise that such evidence is highly prejudicial to a defendant and causes the jury to base their verdict on facts unrelated to the crime charged.

ARGUMENT

I

The Petitioner, Harvey D. Holloway, respectfully submits to this Honorable Court that his due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were denied him during the trial of the instant case. The specific contention made by the Petitioner is that his conviction was based soley on the uncorroborated testimony of an accomplice.

Code of Alabama, 1975, § 12-21-222, provides the following guidelines for corroborating an accomplice's testimony:

> " A conviction of a felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances

thereof, is not sufficient."

Mr. Holloway contends to this court that the requirements of the above statute have not been complied with.

The evidence presented by the State during their case in chief consisted of the testimony of the accomplice Billy Bolding, Deputy Sherriff Johnny Grant and ABC Board agent James Buttram. Bolding testified that he had previously been tried and convicted in this case and that although he was driving his own automobile it was the Petitioner who placed the sacks of marijuana in the trunk and directed him where to drive. Bolding acknowledged that he knew the sacks contained marijuana. The testimony of Officer Grant and Mr. Buttram merely stated that they observed Mr. Holloway as a passenger in Bolding's car and that they followed the car while

it was in Gasden. The only testimony placing Mr. Holloway in possession of the marijuana was that of Billy Bolding, whose testimony in and of itself is insufficient to support the conviction.

In determining that Bolding is in fact an accomplice we only have to see that he was tried and convicted of the same offense and the district attorney referred to him as a " co-conspirator " and treated him as such during the course of the trial.

To determine whether Bolding's testimony was corroborated it is necessary to eliminate Bolding's evidence and evaluate the remaining testimony. McCoy v. State, 397 So.2d 577 (Ala.Cr.App. 1981). The two remaining state's witnesses could only place the Petitioner as a passenger in

Bolding's car and their testimony does not further implicate Mr. Holloway. Their tesimony cannot place him in possession of the marijuana as alleged in the indictment.

In McCoy v. State, supra, the Alabama Court of Criminal Appeals reversed and rendered a case wherein they determined that without the testimony of the accomplice the remaining evidence was not sufficient to support a conviction for arson. The court likened our §§ 12-21-222, Code of Alabama, 1975, to an identical statute in Oklahoma and cited with approval Faye v. State, 606 P.2d 599 (Okl.Cr. 1980). The Faye case held that corroborative evidence was not sufficient if any of the accomplice's testimony is needed to "form the link" between the accused and the crime he is charged with.

It is certainly apparent in the instant case that without the accomplice's testimony to "link" Mr. Holloway to the crime charged the State could never have made a prima facie case. It is axiomatic under Alabama law that the mere presence of a person in a car other than his own, where drugs were found is not sufficient to establish the fact that the defendant had knowledge of the drugs. Pryor v. State, 265 So.2d 907 (Ala.Cr.App. 1972) It would certainly be even more difficult in the present case to impute Mr. Holloway with the requisite knowledge that there was marijuana in the trunk of the car in which he was riding. Under Alabama law Mr. Holloway could not be held to be in possession of the controlled substance.

The denial of the Petitioner's motion for judgment of aquittal at the close of the State's case was error. In establishing the Petitioner's guilt by way of the uncorroborated evidence of Bolding, Mr. Holloway's due process rights were violated and this court should remedy the encroachment by reversing the case to the Alabama Court of Criminal Appeals with directions to remand for a new trial.

II

The second issue presented for this Court's review involves the violation of the Petitioner's due process rights when evidence pertaining to an offense separate and distinct from the one alleged in the indictment is introduced at trial.

The instant case is concerned with trafficking in a controlled substance and is based on an indictment from Etowah County. Testimony was admitted by the trial judge that the Petitioner had been arrested for possession of marijuana in Marshall County.

In the State's case in chief, the prosecutor attempted to introduce testimony concerning the arrest in Marshall County, but defense counsel's objection was sustained. However, on rebuttal

the trial judge allowed the prosecutor to admit the objectionable evidence.

It has long been well recognized law in Alabama that evidence presented at trial which tends to show a separate and distinct offense from the one charged is inadmissible. Dennison v. State, 17 Ala.App. 674, 88 So. 211 (1921) and Terrell v. State, 397 So.2d 232 (Ala.Cr.App. 1981), writ denied 397 So.2d 235 (Ala. 1981)

The United States Court of Appeals, Fifth Circuit, spoke on this issue in United States v. Turquitt, 557 F.2d 464 (5th Cir. 1977) The defendant was charged with unlawful possession of stolen mail matter, and on rebuttal the government admitted evidence that the defendant had unlawfully sugned a false name to a lease, He had not been convicted of the

second offense. The Court reversed and remanded the case and addressed this issue as follows:

> " Evidence which shows or tends to show commissions of crimes not charged is inadmissible in a trial for a particular crime.' (citations omitted) This rule is necessary to prevent conviction baesd on a jury's belief that the accused is a person of bad character. The jury's determination of guilt or innocence should be based on evidence releavnt to the crime charged."

See also United States v. Labarbera, 581 F.2d 107 (5th Cir. 1978), wherein evidence was intrduced of an unrelated arrest. The Court reversed and remanded calling the evidence concerning the arrest " inadmissible" and "highly prejudicial".

In the case at bar the evidence concerning the separate drug offense was

introduced solely as an inflammatory tactic to prejudice the jury against the appellant. Every defendant comes into court to answer the allegations contained in a particular indictment. Here, the Petitioner was called on to answer the charge of trafficking in marijuana in Etowah County, and instead, after the commencement of the trial, even after the defense had rested, it was evident that he was also, in effect, being tried for trafficking in marijuana in Marshall County. The evidence on the Marshall County arrest was for no purpose than to build a conviction on inferences of guilt of the other separate offense. The great danger to the defendant in situations such as this is to instill in the minds of the jury the inference that since the defendant committed one

crime similar to the one he is charged with he must have committed the one he is on trial for. Furthermore, serious legal issues surround the search and seizure of the marijuana in Marshall County, and the testimony of the search was allowed wihtout an exhaustive investigation into the surrounding questions of what the appellant contends was an illegal seizure. The Petitioner's due prcess rights have been grievously injured by the trial court's action.

CONCLUSION

In conclusion, the Petitioner, Harvey D. Holloway, respectfully submits that the decisions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama, in affirming the decision of the trial court, have affirmed actions which infringe on the Petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision of the Courts of Alabama and on such review reverse and remand the instant case.

Arthur J. Hanes, Jr.

ARTHUR J. HANES, JR.
Attorney for Petitioner

Virginia A. Vinson

VIRGINIA A. VINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 10 day of September, 1984, and addressed as follows:

Honorable Charles Graddick
Attorney General
250 Administrative Building
Montgomery, Alabama 36130

Arthur J. Hanes, Jr.

ARTHUR J. HANES, JR.
Attorney for Petitioner
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536

Virginia A. Vinson

VIRGINIA A. VINSON
Attorney for Petitioner
617 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908

84-386

Office - Supreme Court, U.S.
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UNITED STATES

OCTOBER TERM, 1984

* *

HARVEY D. HOLLOWAY,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* *

APPENDIX

TO THE PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF ALABAMA

* *

BRIEF OF PETITIONER

* *

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(205) 324-9536
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Birmingham, Alabama 35203
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ATTORNEYS FOR PETITIONER

12 pp

No._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

* *

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Petitioner

vs.

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* *

APPENDIX

TO THE PETITION FOR A WRIT OF
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* *

BRIEF OF PETITIONER

* *

ARTHUR J. HANES, JR.
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Birmingham, Alabama 35203
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(205) 252-4908

ATTORNEYS FOR PETITIONER

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APPENDIX "A"

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

Re: CC82-475-SW

7 Div. 196 Etowah County Circuit Court

HARVEY D. HOLLOWAY,

Appellant

vs.

THE STATE,

Appellee

Dear Sir: This is to advise you that on April 10, 1984 the Court of Criminal Appeals announced decision of: affirmance-no opinion - in the above stated cause.

Yours truly,

Mollie Jordon, Clerk

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

Re: CC82-475-SW

7 Div. 196 Etowah County Circuit Court

HARVEY D. HOLLOWAY,

Appellant

vs.

THE STATE,

Appellee

Dear Sir: This is to advise you that on May 8, 1984 the Court of Criminal Appeals announced decision of: application for rehearing overruled - Rule 39 (k) motion denied - affirmance - no opinion - in the above stated cause.

Yours truly,

Mollie Jordon, Clerk

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

P.O. BOX 351

MONTGOMERY 36101

July 25, 1984

JOHN O. HARRIS
Presiding Judge

MOLLIE JORDON
Clerk

JOHN C. TYSON,III

JOHN P. DECARLO

JOHN G. BOOKOUT

WILLIAM M. BOWEN, JR.

Judges

Hon. Charles M. Purvis
Hon. Virginia A. Vinson
Attorneys at Law
617 Frank Nelson Building
Birmingham, Alabama 35203

Re: 7 Div. 196, Harvey D. Holloway
vs. State of Alabama

Dear Sir:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from July 13, 1984 to allow filing of a

petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court.

Very truly yours,

/s/ Mollie Jordon
Clerk

cc: Clerk, Circuit Court of Etowah County
Office of the Attorney General
File

APPENDIX "B"

MAILING ADDRESS:

P.O. BOX 157
MONTGOMERY, ALABAMA 36101

TELEPHONE:

832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-932
EX PARTE: HARVEY D. HOLLOWAY
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(Re: Harvey D. Holloway, alias vs. State)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/ record on appeal to an including

_____ Appell_____granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

XXXXXXX Petition for Writ of Certiorari denied. No opinion. Faulkner,J.-Torbert, CJ., Almon, Embry and Adams, JJ., concur.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted.

_____

/s/ Robert G. Esdale, Clerk
Supreme court of Alabama

7/13/84
bsa

APPENDIX "C"

a) United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

b) United State Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

Code of Alabama 1975:

§ 12-21-222 Accomplice's testimony for felony conviction.

* * * * * * * * * * * * * * * * * *

A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof is not sufficient.

CERTIFICATE OF SERVICE

I, Arthur J. Hanes, Jr., a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Harvey D. Holloway, the Petitioner, do hereby certify that on this the 12th day of September, 1984, I did serve the requisite number of copies of the foregoing on the Attorney General of the United State of Alabama, Respondent, by mailing same to them, first class, postage prepaid and addressed as follows:

Hon. Charles Graddick
Office of Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Arthur J. Hanes, Jr.

ARTHUR J. HANES, JR.
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Birmingham, Alabama 35203
(205) 324-9536

Virginia A. Vinson

VIRGINIA A. VINSON
617 Frank Nelson Building
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ATTORNEYS FOR PETITIONER

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OCTOBER TERM, 1984

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PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

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Montgomery, Alabama 36104
(205) 262-0336

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

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HARVEY D. HOLLOWAY,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

McLAIN AND HAMPTON
567 South Hull Street
Montgomery, Alabama 36104
(205) 262-0336

QUESTIONS PRESENTED

1. Whether the conviction of the Petitioner was had upon the uncorroborated testimony of an accomplice?

2. Whether the State of Alabama may prove a Petitioner's doing of a similar criminal act as tending to show that in doing of a now-charged act that the Petitioner had that intent which is an element of the now-charged crime?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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STATE OF ALABAMA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

1. The decision of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction came without opinion on April 24, 1984. A copy of this ruling is found in Appendix "A" of the Petitioner's brief to this Court.

On July 31, 1984, the Alabama Supreme Court denied the Petitioner's petition for a writ of certioari, without opinion. A copy of said order is attached to the Petitioner's brief as Appendix "B".

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claims under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioner alleges his claim under Code of Alabama, 1975, S 12-21-222. A copy of that statutory provision is attached to the Petitioner's brief as Appendix "D" to said petition.

STATEMENT OF THE CASE

The Petitioner, Harvey D. Holloway, was indicted, tried and convicted of trafficking in cannabis. Upon adjudication of guilt, the Trial Court sentenced the Petitioner to twenty years in the penitentiary and imposed a $25,000 fine.

The Petitioner appealed his conviction to the Alabama Court of Criminal Appeals. As set forth previously, that Court affirmed the conviction of the Petitioner without opinion. A subsequent petition for a writ of certiorari to the Alabama Supreme Court was denied without opinion.

The basic facts of this case proved that on April 2, 1982, at approximately 11:00 a.m., Johnny Grant and James Buttram, of the Etowah County Sheriff's Department and the A.B.C. Board respectively, were conducting surveillance on the house located at 308 Clark Street

in Gadsden, Alabama. During the surveillance, the two law enforcement officials observed a 1975 Buick automobile arrive at the residence under surveillance. The vehicle was being driven by one Billy Martin Bolding, with the passenger of that vehicle being the Defendant, Harvey D. Holloway.

The Defendent was observed getting out of the car and walking up to the housetrailer located at the above-stated address. Shortly thereafter, the Defendant came out of the home accompanied by two other men. The two men with the Defendant got into a 1971 Plymouth automobile. The Defendant and Bolding got back into the Buick automobile and followed the Plymouth. Officers Grant and Buttram followed these two vehicles in their surveillance automobile to an address at 404 Noojin Court.

At this address, several people were observed coming out of the house and going to the car in which Bolding and the Defendant were seated. Someone took the keys to the car from

Bolding and then went to the rear of the vehicle and opened the trunk. The men took out two large, white bags and placed them in the trunk of the Plymouth. Then one of the men went inside the house and came back with a small bowl which he took to the trunk of the car. Then the two men got back into the Plymouth automobile and left the scene. The officers then observed the Defendant and three other people go back inside the house at this address.

Officer Grant left and went to the Courthouse to obtain a search warrant. The search warrant provided for the search of the automobiles and premises located at the address in question. Shortly thereafter, the Plymouth automobile returned and the two men riding in this automobile went inside the house. The Defendant and another man then came out of the house and got into the Buick and left the scene. The search warrant was executed at the house and revealed nothing inside the residence. One

of the individuals inside the house, a Mr. James Carter, told the police officers executing the search warrant that the Plymouth automobile was his. Carter then gave the keys to said automobile to the police officers.

The police officers found the two bags of marijuana in the small bowl which also contained marijuana in the trunk of the Plymouth. The individuals involved were transported to police headquarters. Officer Grant took the marijuana into custody as evidence. Statements were taken of some of the people involved by the police officers.

Bolding, the driver of the automobile in which the Defendant was seated when observed by law enforcement officers earlier, testified in Court that the 1975 Buick automobile was his. He also testified that the Defendant was contacted by him to get a part for one of his trucks. The Defendant had told Bolding that he would be happy to help Bolding procure the part

necessary for his truck. The Defendant came to Bolding's house on the evening prior to their departure for Gadsden. The Defendant put the two bags of marijuana in the trunk of Bolding's automobile. Bolding testified that he observed the Defendant take the marijuana out of the Defendant's car and place it in Bolding's automobile. When questioned as to how he know the marijuana was in fact marijuana, Bolding testified that the Defendant had previously told him that the substance in the sacks was marijuana.

Bolding testified that theDefendant then directed him to the trailer located at 308 Clark Street. Once the Defendant and Bolding arrived at this location the Defendant got out of the car and went inside the trailer. The Defendant then came out of the trailer with some other men who got into another car which the Defendant then directed Bolding to follow. Bolding stated that when he got to the house in question, the two men came to him to get

his keys and took the bags out of the trunk of Bolding's car. Bolding further testified that the Defendant had paid Bolding's attorney's fees and arranged for his bond subsequent to Bolding's arrest on this drug charge.

Officer Buttram testified as to the facts which were also testified to by Officer Grant. Both of these officers' testimony affirmed the facts as to the Defendant's participation in this drug.scheme. Officer Grant also testified to the effect that he had received information concerning drug activity at this address from a confidential, reliable informant.

REASONS FOR DENIAL OF THE WRIT

I

The conviction of the Petitioner was not solely upon the uncorroborated testimony of an accomplice. The Petitioner contends to this Court his conviction was had solely upon the uncorroborated testimony of an accomplice in violation of Code of Alabama, 1975, S 12-21-222. The Respondent, State of Alabama, would submit that the evidence presented by the State at the trial of this Petitioner consisted of more than the accomplice's testimony of Bolding which the Petitioner now urges was the basis of the conviction. The State offered not only the testimony of Bolding but also the testimony of the two law enforcement officers involved, Johnny Grant and James Buttram. Both of these officers testified that they personally observed the Petitioner at the scene of the drug transactions and observed the Defendant's active participation in this illegal activity.

As stated previously, these two officers

testified that they saw the Petitioner in Bolding's automobile when it arrived at 308 Clark Street. The Petitioner got out of the automobile and went to the house trailer located at this address. Shortly thereafter, the Petitioner came out of the trailer with two other men. Those two men got into another automobile which was then followed by the Petitioner and Bolding in Bolding's automobile. When the two cars arrived at 404 Noojin Court, the people in the Plymouth automobile got Bolding's keys from him and then took the marijuana from the trunk of Bolding's car and placed it in the Plymouth.

The evidence therefore showed that the Petitioner had placed the marijuana in Bolding's vehicle prior to the trip to Gadsden. The Petitioner had told Bolding that the bags contained marijuana. The law enforcement officers observed the bags being removed from Bolding's car by the other people who were a part of this conspiracy.

It has been held in the Appellate Courts of the State of Alabama that the evidence corroborated the testimony of an accomplice in a criminal prosecution need not be strong, nor sufficient in or of itself to support a conviction. The sufficiency of such evidence is tested by whether it legitimately tends to connect the accused with the offense. Jacks v. State, 364 So.2d 397, writ denied, 364 So. 2d 406 (Ala. 1978). That case also stands for the proposition that both circumstantial and direct evidence are competent to connect a criminal Defendant independently with the crime about which the accomplice has testified.

The law of Alabama requires in a criminal prosecution such as this that the State prove three essential elements: (1) actual or potential physical control; (2) intention to exercise dominion; (3) external manifestation of intent and control. Lee v. State, 350 So.2d 743, 748 (Ala. Cr. App. 1977). The evidence presented by the State of Alabama in the instant

case showed that the Petitioner had actual physical possession and control of the bags of marijuana in question. This possession is further evidence of the Petitioner's intent to exercise dominion over the controlled substance. It is submitted that the actual possession of the substance by the Petitioner was an external manifestation of his intent. On these facts, the conclusion would be that the evidence presented fulfill the essential elements necessary for proof of possession for a prosecution for such crime in the State of Alabama.

Further, when the presence of the accused at the scene of the crime is established along with the evidence of his knowledge of the presence of a prohibited substance, which can be shown circumstantially, then the issue of a criminal defendents' guilt should be submitted to the jury. Radke v. State, 292 Ala. 290, 293 So. 2d 314. The testimony of the law enforcement officers conducting surveillance

established the presence of the Petitioner at the scene of the drug transactions. Further facts and testimony established that the Petitioner was in physical possession of the contraband and participated actively in the trafficking of the contraband in question.

The evidence presented by the State did not consist solely of the testimony of the Petitioner's accomplice. Rather testimony of the two law enforcement officers conducting surveillance and their observations at the scene of the drug transactions placed the Defendant at the scene of said crime and confirmed his participation in the crimes as testified to by Bolding. The facts of the case were more than sufficient to submit the issue of the Petitioner's guilt or innocence to the jury. The Petitioner has failed to demonstrate to this Court a factual basis for his allegation that this conviction was had solely upon the uncorroborated testimony of an accomplice.

II

THE STATE MAY PROVE A PETITIONER'S DOING OF A SIMILAR CRIMINAL ACT AS TENDING TO SHOW THAT IN DOING OF A NOW-CHARGED ACT HE HAD THAT INTENT WHICH IS A NECESSARY ELEMENT OF THE NOW-CHARGED CRIME.

The second issue urged by the Petitioner as a basis for his petition is that the Trial Court committed reversible error in allowing the State to show that the Petitioner had been arrested for possession of marijuana on a previous case. At the trial of the Petitioner, the District Attorney stated to the Court, and on the record, that this particular evidence was being offered solely for the purpose of proving the common plan, scheme and design of a criminal defendant.

At the trial of his case, the Petitioner had taken the stand and flatly denied that he had in any way participated in this illegal drug transaction. On rebuttal, the State was then allowed to prove that an automobile

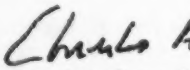
supposedly belonging to the Petitioner was discovered to contain marijuana. As set forth in Part I of this brief, intent is a material element of the crime of possession charge which was being tried against this Petitioner. The law of Alabama states that the prosecution may show, in cases concerning crimes that require prerequisite intent, prior criminal acts of the Defendant to show that he had the necessary intent when the committed the now-charged crime. Pope v. State, 365 So.2d 369 (Ala. Cr. App. 1978). And in certain crimes, the State may prove the accused's doing of similar acts as tending to show that in doing of a now-charged act, the accused had that intent that is an element of the now-charged crime. Whiddon v. State, 53 La. App. 280, 299 So.2d 326 (1973). The Respondent would submit that testimony concerning the similar, prior misconduct of the Petitioner was therefore admissible. McElroy's Sec. 69.01(6), C. Gamble 3d ed. 1977.

Finally, Respondent would submit that there was no objection voiced by defense counsel at the time this particular testimony was offered. Under the laws of this state, a specific objection is required. Defense counsel's general objection which was previously voiced to this type of question failed to preserve that issue for the Appellate Court's review.

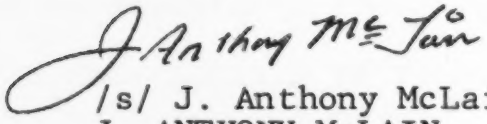
CONCLUSION

Based on the foregoing argument the Respondent would submit that the writ of certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submitted,



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA



/s/ J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the 11th day of October, 1984, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

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